No. 94-1175

In the Supreme Court of the United States

OCTOBER TERM, 1995

BANK ONE, CHICAGO, N.A., PETITIONER

v.

MIDWEST BANK & TRUST COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Expedited Funds Availability Act, 12 U.S.C. 4001 *et seq.*, grants federal courts jurisdiction over inter-bank disputes concerning the collection of checks.

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INTEREST OF THE UNITED STATES

This case presents the question whether a federal court may adjudicate a private inter-bank civil liability claim under the Expedited Funds Availability Act (EFA Act), 12 U.S.C. 4001 *et seq.* Congress has charged the Board of Governors of the Federal Reserve System (Federal Reserve Board or Board) with primary responsibility for administering the EFA Act, which supplements established state and federal law governing the collection of checks. The Federal Reserve Board has promulgated implementing regulations reflecting the Board's understanding that the

courts, and not the Board, will adjudicate private damage actions under the Act. Following the court of appeals' ruling that federal courts lack jurisdiction over inter-bank disputes, the Board filed a brief amicus curiae in that court supporting a petition for rehearing, which the court denied. Petitioner sought review in this Court, and the Court invited the Solicitor General to file a brief amicus curiae expressing the views of the United States. The United States urged that the petition for a writ of certiorari be granted and now urges that the court of appeals' decision be reversed.

STATEMENT

The EFA Act addresses aspects of the national system of payment by check. The Act contains a section entitled "Civil Liability," 12 U.S.C. 4010, that (1) spells out the right of persons, other than depository institutions, to recover damages for a depository institution's failure to comply with the Act's funds availability requirements, 12 U.S.C. 4010(a), and (2) authorizes the Board of Governors of the Federal Reserve System "to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system," 12 U.S.C. 4010(f). Subsection 4010(d) provides that "[a]ny action under this section may be brought in any United States district court, or in any other court of competent jurisdiction." 12 U.S.C. 4010(d). The Board has set out liability principles pursuant to 12 U.S.C. 4010(f) in Regulation CC, 12 C.F.R. Pt. 229.

Petitioner Bank One, Chicago, N.A., sued respondent Midwest Bank and Trust Company in federal district court and sought to hold Midwest liable in damages for a violation of Regulation CC's requirements. The district court entered summary judgment for Bank One, Pet. App. 5-14, but the court of appeals vacated that judgment and ordered dismissal on the ground that the federal district court lacked jurisdiction over the dispute, *id.* at 1-3.

1. Congress enacted the EFA Act as Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635, in order to accelerate the availability of funds to bank depositors and to improve the Nation's check payment system. See H.R. Rep. No. 52, 100th Cong., 1st Sess. 1-2, 12-14 (1987).[1] Congress acted in response to public concern that depository institutions were unduly delaying depositor access to deposited funds by placing temporary "holds" on those deposits. Depositors complained that they frequently encountered difficulties in using their checking accounts because of those holds. See S. Rep. No. 19, 100th Cong., 1st Sess. 25-28 (1987); Regulation CC, 53 Fed. Reg. 19,372 (1988) (preamble).[2]

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[1] Checks are only one part of the national payment system, which has both cash and non-cash components. The Federal Reserve is integrally involved in all aspects of the payment system. Its cash services include the distribution of currency and coin and the removal of unfit notes and coins from circulation. Its non-cash services include the collection of checks, the processing of electronic fund transfers, and the provision of net settlement services to private clearing arrangements. See Board of Governors of the Federal Reserve System, *The Federal Reserve System: Purposes & Functions* 94-95 (1994).

[2] Depository institutions (which we shall generally refer to collectively as banks) imposed the holds to protect themselves against the risk that deposited checks would not be paid, which risk resulted in part from inter-bank delays in the return of "bad checks." The longer that a bank was uncertain whether a check would be paid, the longer the bank maintained the hold

The EFA Act responds to that problem in two ways. First, it imposes specific requirements on banks to hasten the availability of funds to depositors. See 12 U.S.C. 4002-4006 (1988 & Supp. V 1993).[3] Second, the Act delegates broad discretion to the Board to reduce the banks' nonpayment risk through improvements in the check payment system. It authorizes the Board to consider various changes in its check processing system and to issue implementing regulations. See 12 U.S.C. 4008.[4]

The EFA Act supplements an established legal framework governing the inter-bank check collection process, which continues to be governed primarily by state law. Although the Board has always exercised control over the process of collecting and returning checks and other items handled through the Federal Reserve System, see Regulation J, 12 C.F.R. Pt. 210, state commercial law—particularly Articles 3 and 4 of the Uniform Commercial Code—has historically

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to protect itself against the risk of nonpayment. See S. Rep. No. 19, *supra*, at 25-28.

[3] For example, the Act contains provisions setting out funds availability schedules, 12 U.S.C. 4002 (1988 & Supp. V 1993), schedule exceptions, 12 U.S.C. 4003 (1988 & Supp. V 1993), bank disclosure requirements regarding funds availability, 12 U.S.C. 4004, and other related provisions, 12 U.S.C. 4005-4006.

[4] The EFA Act also empowers the Board to create by regulation exceptions to the statutorily specified schedules for funds availability in order to protect banks against certain risks. Compare 12 U.S.C. 4002(a)(2), (b), (c), and (e) (1988 & Supp. V 1993) (establishing mandatory schedules for availability) with 12 U.S.C. 4003(b), (d), and (e) (1988 & Supp. V 1993) (expressly authorizing the Board to create exceptions for specified areas of risk, including large checks, repeated overdrafts, fraud, and emergency conditions).

established the basic legal rights and responsibilities respecting negotiable instruments, bank deposits, and collections. The EFA Act recognizes the long-standing and important role of state law in banking transactions, and it preserves state laws that impose more stringent funds availability requirements than the Act itself provides. 12 U.S.C. 4007(a). The Act explicitly provides, however, that the Board's regulations implementing the EFA Act will otherwise supersede inconsistent state laws, including the Uniform Commercial Code. 12 U.S.C. 4007(b).[5]

The EFA Act authorizes the Board and other federal banking agencies to compel banking institutions within the agencies' respective jurisdictions to comply with the Act's statutory and regulatory requirements. See 12 U.S.C. 4009 (1988 & Supp. V 1993). Subsection 4009(a) authorizes enforcement primarily through Section 8 of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. 1818 (1988 & Supp. V 1993), which allows banking agencies to issue cease-and-desist orders, impose civil penalties, and pursue other sanctions. See 12 U.S.C. 4009(a) (1988 & Supp. V 1993). Subsection 4009(c)(1) grants the Federal Reserve Board residual authority to enforce any requirements that are not "specifically committed to some other Government agency under subsection (a) of this section." 12 U.S.C. 4009(c)(1). See

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[5] See generally H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 177-182 (1987); E.L. Rubin, *Uniformity, Regulation, and the Federalization of State Law: Some Lessons from the Payment System*, 49 Ohio St. L.J. 1251 (1989).

H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 183 (1987).[6]

The EFA Act also contains civil liability provisions, which are the subject of this suit. See 12 U.S.C. 4010. Subsection 4010(a) addresses a depository institution's liability to a person or entity other than another depository institution. It states as follows:

> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of [a prescribed measure of damages].

12 U.S.C. 4010(a). Subsection 4010(f) addresses a depository institution's liability to others arising out of the payment system. Its coverage includes the liability of one depository institution to another. Subsection 4010(f) states as follows:

[6] Section 4009 generally parallels the FDI Act in allocating responsibility for enforcement of the EFA Act among the financial institution regulatory agencies, depending upon the nature and charter of each financial institution. See 12 U.S.C. 1818(a), (b), and (i) (1988 & Supp. V 1993). Subsection 4009(c) supplements that approach by giving the Board enforcement authority over institutions that are outside of the jurisdiction of any of the banking agencies under the FDI Act, but are within the scope of the EFA Act as participants in the payment system. Those institutions include the Federal Reserve Banks, Federal Home Loan Banks, and units of local government. See 12 C.F.R. 229.2(e).

> The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

12 U.S.C. 4010(f). Subsection 4010(d) provides for federal (and state) court jurisdiction over civil liability suits, stating:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved.

12 U.S.C. 4010(d).

The Board has implemented the EFA Act, including specification of the principles governing check collections, through Regulation CC. 12 C.F.R. Pt. 229; see 53 Fed. Reg. 19,433 (1988). Regulation CC contains three subparts: Subpart A defines terms and provides for administrative enforcement of violations of the other Subparts; Subpart B contains the funds availability schedules and disclosure requirements specified in the Act, including banks' liability to depositors for violations of those requirements (12 C.F.R. 229.21); and Subpart C includes rules to speed the collection and return of checks, including rules relating to banks' liability under Subsection 4010(f)

for breaches of duties defined in those rules (12 C.F.R. 229.38).[7]

Regulation CC recognizes that the EFA Act provides a statutory grant of judicial jurisdiction over civil liability claims (12 U.S.C. 4010(d)) by stating that an action under Subpart C "may be brought in any United States district court, or in any other court of competent jurisdiction." 12 C.F.R. 229.38(g). Regulation CC implements the EFA Act provisions for administrative enforcement in terms that closely track the text of Section 4009 of the EFA Act. 12 C.F.R. 229.3. It does not establish any administrative tribunal for inter-bank check collection claims.

2. Petitioner Bank One (formerly First Illinois Bank and Trust) sued respondent Midwest Bank and Trust in federal district court, alleging that Midwest had violated its duties under Regulation CC. See Pet. App. 18-21. Bank One's complaint stated that a Bank

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[7] As one commentator explained,

> [f]or the most part, Subpart B restates the rules of the statute and fills in a number of details.
>
> Subpart C takes Congress up on its invitation to revamp check collection rules in order to encourage quicker returns. Unlike Subpart B, Subpart C does not follow precise statutory guidelines but paints the picture itself. Subpart C contains rules to expedite the collection and return of checks, just as Subpart B contains rules to expedite funds availability for the depositor.

B. Clark & B. Clark, *Regulation CC: Funds Availability and Check Collection* ¶ 2.01 (1988). The Board designed the provisions of Subpart C to complement the statutory availability schedules in Subpart B. Subpart C's check system improvements decrease risks of nonpayment for banks by "reduc[ing] the number of situations when the bank will be required by law to make funds available to its customers before it learns a check has been dishonored." See 53 Fed. Reg. 19,373 (1988).

One customer had deposited a check drawn on a Midwest account. *Id.* at 6, 18. When Bank One submitted the check to Midwest through normal banking channels for collection, Midwest returned it for a guarantee of endorsement. *Ibid.* Bank One provided the guarantee and made the funds available to the Bank One customer. *Id.* at 7, 19. Midwest later refused payment of the check based on the lack of sufficient funds in the Midwest payor's account. *Id.* at 7-8, 19. Bank One contended that Midwest had violated its legal obligations by failing to provide timely notice that the payor had insufficient funds to cover the check. *Id.* at 19-21.

Midwest moved to dismiss Bank One's suit under Rule 12(b)(6), Fed. R. Civ. P., on the ground that Bank One had failed to state a claim on which relief could be granted. See Pet. App. 17, 20. The district court denied that motion, holding that Bank One had stated an actionable claim under the Federal Reserve Board's Regulation CC, which requires banks to "exercise ordinary care and act in good faith in complying with" Regulation CC's check collection requirements, 12 C.F.R. 229.38(a). See Pet. App. 20-22. The court ruled on cross-motions for summary judgment that "Midwest did not act with ordinary care in returning the check for guarantee of endorsement without first checking the sufficiency of the funds in support of the check." *Id.* at 12. It entered judgment for Bank One in the amount of $43,912.06. *Id.* at 15-16.

Midwest appealed. The court of appeals questioned during oral argument whether the federal district court had subject matter jurisdiction over the dispute. Pet. App. 2. The court of appeals ordered supplemental briefing on that issue, and it later ruled

that the EFA Act does not grant federal court jurisdiction over inter-bank disputes. *Id.* at 1-3. The court of appeals concluded that Congress had intended that those disputes would "be handled administratively" under Subsection 4009(c)(1), which grants the Federal Reserve Board residual authority to enforce requirements of the EFA Act that are not "committed to some other Government agency." 12 U.S.C. 4009(c)(1). The court held:

> Therefore, if plaintiff can state a colorable violation under the Regulations, it must make its case before the Board of Governors rather than the federal courts.

Pet. App. 2. The court vacated the judgment and ordered the district court to dismiss the action for lack of jurisdiction. See *id.* at 3.

Bank One petitioned for rehearing, and the Federal Reserve Board filed a brief as amicus curiae supporting that petition. The Board stated that Regulation CC contemplated that inter-bank civil liability claims would be cognizable in federal court, see 12 C.F.R. 229.38(g), and also pointed out that the Board had not created an administrative mechanism for handling such claims. The court of appeals denied the petition for rehearing, but modified its opinion. It deleted the passage, quoted above, directing Bank One to "make its case before the Board," and it modified the paragraph that had contained that passage to state as follows (additions in italics):

> Disputes such as this, between members of the Federal Reserve system, are to be handled administratively before the Board of Governors of the Federal Reserve System pursuant to 12 U.S.C. § 4009(c)(1) *(or perhaps in state court)*. This conclusion is bolstered by the provisions of 12 U.S.C. § 4010(f), which authorize the Federal Reserve Board to establish liability among "depository institutions" such as these parties. *Although the Board of Governors has informed us that no mechanism is currently available for administrative resolution of such disputes, the Board's differing interpretation of this statute cannot confer jurisdiction upon the Court.*

Pet. App. 24-25.

SUMMARY OF ARGUMENT

The EFA Act's civil liability provisions establish private remedies for violation of the Act's requirements. Those provisions prescribe specifically the scope and measure of remedies that are available to bank customers for a bank's violation of the Act's funds availability requirements, but they direct the Federal Reserve Board to determine the scope of the remedies for inter-bank payment system disputes. The Act expressly provides for concurrent federal and state court jurisdiction over a check collection dispute in both situations.

The court of appeals' ruling that the Board must resolve inter-bank disputes is inconsistent with the text, structure, and history of the Act. It is also inconsistent with this Court's presumption in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that, when Congress intends to confer adjudicatory authority upon administrative agencies, it does so explicitly.

The court of appeals should not have rejected the Board's reasonable and correct interpretation of its powers. The court's interpretation is particularly questionable because of its potential practical con-

sequence of fragmenting the resolution of payment system disputes among state, federal, and administrative fora, rather than allowing a single tribunal, state or federal, to resolve the dispute. The ultimate result of the court's interpretation would be to diminish the effectiveness of the Board's check collection rules.

ARGUMENT

THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE EFA ACT REQUIRES THE FEDERAL RESERVE BOARD, RATHER THAN THE COURTS, TO ADJUDICATE INTER-BANK DISPUTES OVER THE PAYMENT OF CHECKS

The court of appeals erred in concluding that the EFA Act directs the Federal Reserve Board, rather than the courts, to resolve inter-bank civil liability suits relating to the check payment system. The court has rejected the Board's reasonable interpretation of its powers and has adopted an implausible construction of the Act that would impair the statute's operation.

1. The EFA Act establishes a civil liability regime for violations of the statute and the Board's implementing regulations. 12 U.S.C. 4010. Subsection 4010(a) creates bank liability toward anyone other than a bank for a bank's failure to comply with the funds availability requirements set out in the statute and the prescribed regulations. See 12 U.S.C. 4010(a). That subsection refers to individual and class "action[s]" that may be brought to enforce this liability, and it also establishes the allowable damages as well as other aspects of the action. Subsection 4010(f) addresses liability arising from the inter-bank payment system. That subsection authorizes the Board "to impose on or allocate among depository

institutions the risks of loss and liability in connection with any aspect of the payment system." 12 U.S.C. 4010(f). It does not specify the measure of damages recoverable for "liability under this subsection," but does limit the total amount of that liability to the amount of the check and, in cases of bad faith, to additional consequential damages.

The court of appeals concluded that the liability of banks to depositors under Subsection 4010(a) was enforceable in court, but that the liability of one bank to another under Subsection 4010(f) could be enforced only in "administrative proceedings." In reaching that conclusion, the court relied in large part on the fact that the liability standard for inter-bank disputes is set by Federal Reserve Board regulations. In giving that feature of the statute conclusive weight, the court appears to have misunderstood the reason for the differences between Subsections 4010(a) and 4010(f).

Congress designed Subsection 4010(a) to provide a specific remedy against banks that failed to make funds promptly available to their customers. Later in the drafting process, Congress added Subsection 4010(f) to deal with the more complex and technical problem of providing remedies, particularly among banks, for losses that result from the inter-bank check payment system. Congress left it to the Board to determine the liability standards for losses in the inter-bank payment system because of the greater complexity of that subject, and not because Congress intended to create remedies that would be adjudicated in different fora.

Congress was familiar with depositor complaints respecting funds availability, which had provided the impetus for the legislation. See, *e.g.*, S. Rep. No. 19,

100th Cong., 1st Sess. 25-28 (1987) (describing consumer studies and congressional hearings). It crafted Section 4010(a) to provide the specific standard of liability and the measure of damages that would govern depositor claims, following the form of other statutory consumer remedies in the financial services industry. See 12 U.S.C. 4010(a).[8] In the course of considering the legislation, the drafters recognized that questions of liability arising from the inter-bank payment system presented a more complex commercial issue. During the Senate-House conference on the legislation, Subsection 4010(f) was added in order to authorize the Board, which has specialized knowledge concerning the inter-bank check collection process, to determine the principles governing liability in that area.[9]

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[8] Subsection 4010(a) was modeled after the civil liability provisions of the Truth in Lending Act, 15 U.S.C. 1640, which allow private parties to bring judicial damage suits to ensure compliance with statute. See S. Rep. No. 19, *supra*, at 70; H.R. Rep. No. 52, *supra*, at 22. See also Equal Credit Opportunity Act, 15 U.S.C. 1691e (1988 & Supp. V 1993); Electronic Fund Transfer Act, 15 U.S.C. 1693m.

[9] Compare H.R. Conf. Rep. No. 261, *supra*, at 105-106 (conference version of civil liability provisions) with H.R. Rep. No. 52, *supra*, at 10-11 (House version of civil liability provisions) and S. 790, 100th Cong., 1st Sess. § 609 (1987) (Senate version of civil liability provisions). The drafters of Subsection 4010(f) channeled the Board's discretion by specifically directing the agency's attention to liability issues involving the payment system and by imposing a damage limitation adopted from antecedent Uniform Commercial Code provisions, which the EFA Act supplements and to some extent supersedes. Subsection 4010(f)'s limitation on damages conforms to the long-standing provisions of U.C.C. Art. 4-103(e), which state that the measure of damages for failure to exercise ordinary care in handling a check is the amount of the check (reduced by the amount that could not have been realized by the exercise of ordinary care), and provide for consequential damages in cases of bad faith.

Congress appropriately entitled Subsection 4010(f) "Authority to establish rules regarding losses and liability among depository institutions." 12 U.S.C. 4010(f). That subsection delegates to the Board the quasi-legislative role of prescribing the standard of liability for inter-bank check payment disputes. Subsection 4010(f) thus directs the Board to "allocate" among banks "the risks of loss and liability." 12 U.S.C. 4010(f). The Board has done so by establishing through regulation the basis for damage claims.[10] But Subsection 4010(f)'s direction does not indicate that the Board should actually adjudicate those claims, and the Board accordingly recognizes that any such claims should be adjudicated through the courts. 12 C.F.R. 229.38(g).[11]

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[10] For example, the Board has specified the standard of care among banks for processing checks, the consequences of a paying bank's failure to make a timely return of a check, the responsibility for legible endorsements, and the application of comparative negligence principles. See, *e.g.*, 12 C.F.R. 229.38.

[11] Subsection 4010(f) also allows the Board to "impose on" banks "the risks of loss and liability" in connection with check payment. The Board has interpreted that phrase as authorizing the Board to subject banks to standards of care with respect to the payment system that are actionable by non-bank entities. See 12 C.F.R. 229.38(a) (stating that a bank is liable if it breaches a duty of care owed to the depository bank, the bank's customer, the owner of the check, or another party to the check). For example, the Board has provided that if the paying bank returns a check to a depository bank, the depository bank must promptly notify the customer who deposited the check. See 12 C.F.R. 229.33(d). The customer may re-

Not only does Subsection 4010(f) contain no suggestion that the Board would adjudicate damage actions, but Congress in addition stated explicitly in Subsection 4010(d) of the EFA Act that the courts would determine damage claims through judicial actions. Subsection 4010(d), which is entitled "Jurisdiction," states:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction.

12 U.S.C. 4010(d). By its terms, Subsection 4010(d)'s grant of jurisdiction extends to all of Section 4010's subsections, including Subsection 4010(f). Its reference to "[a]ny action under this section" clearly appears to embrace a damage suit based on Subsection 4010(f).[12] If Congress had intended that Subsection 4010(f) claims would be resolved through agency rather than court adjudication, it appears likely that it would have said so in light of the broad and otherwise controlling language of Subsection 4010(d).[13]

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cover actual damages if the depository bank fails to provide notice, 12 C.F.R. 229.38(a), but the customer must seek that remedy through a court action, 12 C.F.R. 229.38(g).

[12] Legislatures and courts use the term "action" to describe "a legal demand of one's right." *Bradford* v. *Southern Ry.*, 195 U.S. 243, 248 (1904) (citing Lord Coke); see also *Neal* v. *Honeywell, Inc.*, 33 F.3d 860, 863 (7th Cir. 1994) ("The word 'action' * * * connotes formal legal proceedings."). Subsection 4010(d) empowers the courts to adjudicate a "legal demand" by one bank against another based on the Board's specification, pursuant to Subsection 4010(f), of their respective rights. See generally *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979).

[13] The legislative history also supports court jurisdiction for proceedings to enforce liability under Subsection 4010(f). As we have noted, Subsection 4010(f) was added during the House-Senate conference. The Conference Report on the Competitive Equality Banking Act of 1987, of which the EFA Act was a part, describes Subsection 4010(f) and states in relevant part:

> This subsection does not limit causes of action brought by accountholders or the amount of damages recoverable by accountholders under any *other* action.

H.R. Conf. Rep. No. 261, *supra*, at 183 (emphasis added). The drafters' reference to "other" actions manifests their view that a proceeding between banks to recover losses or damages under Subsection 4010(f) would be an "action" for purposes of Subsection 4010(d).

2. The language, structure, and history of the EFA Act's civil liability provisions thus all indicate that federal and state courts, rather than the Board, would adjudicate inter-bank payment disputes. The court of appeals' contrary ruling—which holds that Congress not only gave the Board authority to determine the standard of liability, but also the power to adjudicate specific claims—would vest the Board with a very unusual power.

Congress regularly authorizes federal agencies to establish criteria that determine whether one private party is civilly liable to another in a judicial action. See, *e.g.*, Securities Act of 1933, 15 U.S.C. 77k (imposing civil liability for failure to provide registration information required by the Securities and Exchange Commission); Consumer Product Safety Act, 15 U.S.C. 2072 (imposing civil liability for violations of consumer product rules promulgated by the Consumer Product Safety Commission); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a)(4)(B) (imposing civil liability for environmental response costs that are consistent with the Environmental Protection Agen-

cy's national contingency plan). But Congress does not normally confer upon an administrative agency authority to adjudicate purely private disputes. If Congress had wished to confer that power on an administrative agency, one would expect that it would have done so explicitly.[14]

This Court indicated in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that it would not lightly infer that Congress has vested an administrative agency with the power to adjudicate private disputes. The Court ruled in *Coit* that the Federal Savings and Loan Insurance Corporation (FSLIC) lacked authority to establish an administrative claims forum to adjudicate creditors' claims against insolvent thrift institutions. *Id.* at 572-579. The Court explained that "when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in

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[14] Although Congress itself usually determines the elements of a legal action, Congress may delegate some or all of that responsibility to an agency, especially where the delegated issue "involves a complex policy choice" and the task "requires an expertise and attention to detail that exceeds the normal province of Congress." *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2418 (1995) (recognizing that Congress has implicitly authorized the Secretary of the Interior to define the term "harm" for purposes of enforcing the Endangered Species Act of 1973); see also *Touby* v. *United States*, 500 U.S. 160, 162-163 (1991) (recognizing that Congress has explicitly authorized the Attorney General to identify new controlled substances for purposes of criminal enforcement). But Congress does not normally assign the agency responsibility for both determining a liability standard and applying it in the context of specific private claims. It is therefore reasonable to expect that Congress would be explicit in granting that adjudicatory power.

considerable detail." *Id.* at 574. It noted that the FSLIC's authorizing statute contained no such provisions in the case of creditor claims. *Ibid.* Like the statutory provisions in *Coit*, the civil liability provisions of the EFA Act are devoid of indicia demonstrating that Congress intended to vest the Board, rather than the courts, with authority to adjudicate inter-bank disputes. See 12 U.S.C. 4010.[15]

The court of appeals suggested that the Board could exercise such power "pursuant to 12 U.S.C. § 4009(c)(1)," which grants the Board residual authority to "enforce" the EFA Act. See Pet. App. 2, 24-25. Section 4009, however, addresses "[a]dministrative enforcement"—not civil liability—and it authorizes banking agencies to use traditional agency enforcement tools, including cease-and-desist orders and civil sanctions, to compel compliance with the Act. See H.R. Conf. Rep. No. 261, *supra*, at 183 ("[Section 4009] requires the Federal banking regulators to use existing administrative enforcement mechanisms to enforce compliance with [the EFA Act]."). Subsec-

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[15] The EFA Act stands in sharp contrast to statutes that do include provisions for administrative adjudication of private claims. See, *e.g.*, Commodity Exchange Act, 7 U.S.C. 18 (1988 & Supp. V 1993); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919-928. In those statutes, Congress expressly confers and describes the adjudicatory powers. See 7 U.S.C. 18(a)-(f) (1988 & Supp. V 1993) (describing the right to an adjudication, authorizing the agency to establish relevant procedures, imposing bond requirements, and providing mechanisms for enforcement and judicial review); accord 33 U.S.C. 919-928 (describing the adjudicatory mechanism in comprehensive detail).

tion 4009(c) does not create any mechanism for the adjudication of inter-bank civil liability claims.[16]

Section 4009 of the EFA Act contains other enforcement procedures, but the court of appeals did not rely on them and they do not include any mechanism that could reasonably be used to enforce the allocation of liability in inter-bank disputes. The remedies available under 12 U.S.C. 1818 (1988 & Supp. V 1993), including cease-and-desist orders and civil monetary penalties, cannot effectively "impose on or allocate among depository institutions the risk of loss and liability" in connection with the payment system, as mandated by Subsection 4010(f). Cf. *Ratner* v. *Chemical Bank New York Trust Co.*, 309 F. Supp. 983, 986 (S.D.N.Y. 1970) (Board's authority to enforce the Truth in Lending Act under Section 1818 "does not allow a private party to bring an action before the Board to seek redress or injunctive relief for any violation of the Act").[17]

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[16] The court of appeals erroneously characterized Subsection 4009(c) as an open-ended source of enforcement authority. Subsection 4009(c), which provides for the ultimate sanction of exclusion from the payment system, is reserved for the payment system participants that are not otherwise subject to bank regulatory enforcement actions under Subsection 4009(a). See 12 U.S.C. 4009(c)(1) and (2). Subsection 4009(c) does not authorize Board enforcement action against an insured depository institution such as the respondent here.

[17] None of the Section 1818 procedures may be initiated independently by a private party, such as a bank. Moreover, the only FDI Act mechanism that could be used to direct one institution to pay another provides for "restitution" and not for "damages." The restitution remedy is normally available only upon a showing that the respondent institution was unjustly enriched or had acted with reckless disregard for the law. See 12 U.S.C. 1818(b)(6)(A) (Supp. V 1993); see *Wachtel* v. *OTS*, 982 F.2d 581, 584-586 (D.C. Cir. 1993). Those limitations on recovery are inconsistent with Subsection 4010(f)'s provisions regarding damages, which clearly envisage recovery even in circumstances in which unjust enrichment or reckless disregard could not be shown.

The situation presented here closely resembles the situation presented in *Coit*. The Court recognized in that decision that the FSLIC had administrative enforcement powers, but nevertheless treated those powers as distinct from any authority to adjudicate disputes between private parties. See 489 U.S. at 574. The same result should follow here. Section 4009 does not contain any reference to administrative adjudication of private disputes, any reference to the Administrative Procedure Act, or any provision for judicial review. It is therefore unlikely that Congress intended Section 4009 to authorize the creation of a novel administrative claims tribunal for inter-bank check collection disputes. See *ibid.*[18]

3. The court of appeals' decision here is also flawed because it rejects a reasonable construction of the EFA Act by the agency principally charged with its administration. See, *e.g.*, *Chevron U.S.A. Inc.* v.

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[18] That conclusion comports with the practical realities that existed when the EFA Act was enacted. In 1987, none of the banking agencies employed full-time administrative law judges, but instead borrowed them from other agencies on an "as-needed" basis. Those agencies established an inter-agency "pool" of administrative law judges in 1989, after Congress enacted an explicit mandate. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 916, 103 Stat. 486-487. Congress is unlikely to have vested the Board with potential responsibility for adjudicating all of the Nation's inter-bank check payment disputes under an "existing" mechanism (H.R. Conf. Rep. No. 261, *supra*, at 183) that did not include any administrative law judges.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842-845 (1984). This Court accords "substantial deference" to the Federal Reserve Board's interpretation of banking statutes that the Board administers "whenever its interpretation provides a reasonable construction of the statutory language and is consistent with legislative intent." *Securities Industry Ass'n* v. *Board of Governors*, 468 U.S. 207, 217 (1984); see *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 68 (1981); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971).

The Board has concluded that the EFA Act does not envision administrative adjudication of inter-bank check collection disputes. In the absence of controlling indications of contrary legislative intent, the court of appeals should have given deference to the Board's interpretation. The Board is the agency that Congress charged with implementing the statute from its inception, and that agency's reasonable and contemporaneous construction would normally "carry the day against doubts that might exist from a reading of the bare words of a statute." See, *e.g.*, *Good Samaritan Hospital* v. *Shalala*, 113 S. Ct. 2151, 2159 (1993), quoting *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In rejecting the Board's views, the court of appeals has conferred novel powers on the Board that the Board itself disavows and has replaced the Board's understanding of the EFA Act's division of responsibilities with a very unusual jurisdictional scheme. Under the Board's construction, all check-related claims may be raised in a single judicial tribunal—either in federal court, which would have supplemental jurisdiction over state claims (including

Uniform Commercial Code claims embodying standards established by Regulation CC), see 28 U.S.C. 1367 (Supp. V 1993), or in a state court of competent jurisdiction.[19]

In contrast, the court of appeals' decision envisions that federal and state courts would adjudicate depositor claims, but that the Board (or other banking agencies with power to "enforce" the Act) would adjudicate inter-bank claims under the EFA Act, while state courts would adjudicate inter-bank state law claims under the Uniform Commercial Code (and "perhaps" claims under the EFA Act). Pet. App. 25. Under the court of appeals' interpretation, a single check collection dispute could generate both an administrative and a judicial adjudication. Banks would be forced to sever customer claims from inter-bank claims and conduct routine inter-bank commercial litigation in a potentially distant and unfamiliar administrative forum.

It is unlikely that Congress meant to fragment adjudicative responsibilities in that way.[20] Congress

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[19] The Uniform Commercial Code article dealing with bank deposits and collections treats "Federal Reserve regulations and operating circulars" as agreements between participants in the payment system whether or not specifically assented to by the parties. U.C.C. 4-103(b); see, *e.g.*, Ill. Ann. Stat. ch. 810, para. 5/4-103(b) (Smith-Hurd 1993). State law provides for a cause of action to recover damages for breach of such an agreement. See, *e.g.*, Ill. Ann. Stat. ch. 810, para. 5/4-111 (Smith-Hurd 1993) (action to enforce obligation arising under article must be commenced within three years after cause of action accrues).

[20] Respondent Midwest argued below that Congress had intended that state courts alone would enforce the Board's liability rules. That construction is also doubtful. Congress nor-

normally does not "prefer the eccentric to the routine." See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part and concurring in the judgment). Its commercial enactments should be construed in light of the traditional preference of the "law merchant" for efficient resolution of disputes. If Congress had intended to require banks to initiate proceedings in the District of Columbia to obtain an administrative adjudication of their bad-check claims, it likely would have "delivered those instructions in more clear fashion." See *id.* at 68-69. The EFA Act does not dictate that result, and the court of appeals has supplied no reason why Congress would have desired that procedure.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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mally provides a federal forum for adjudication of federal law. See 28 U.S.C. 1331.